Nos. 96-843 and 96-847

In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
PETITIONER

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

AT&T FAMILY FEDERAL CREDIT UNION, ET AL.,
PETITIONERS

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL CREDIT UNION ADMINISTRATION

ROBERT M. FENNER
General Counsel
JOHN K. IANNO
Attorney
National Credit Union Administration
Alexandria, VA 22314-3428

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
DOUGLAS N. LETTER
JACOB M. LEWIS
MICHAEL E. ROBINSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

57 pp

QUESTIONS PRESENTED

The Federal Credit Union Act (FCUA) limits federal credit union membership "to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. 1759. The questions presented are:

1. Whether banks, which the court of appeals found not to be among the intended beneficiaries of the FCUA, nonetheless fall within the "zone of interests" of that Act to have standing to challenge the interpretation by the National Credit Union Administration (NCUA) of the FCUA's common bond requirement.

2. Whether the NCUA reasonably interpreted the common bond provision to permit membership in a federal credit union to consist of multiple groups, so long as each group has its own common bond.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-843

NATIONAL CREDIT UNION ADMINISTRATION,
PETITIONER

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

No. 96-847

AT&T FAMILY FEDERAL CREDIT UNION, ET AL.,
PETITIONERS

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE
NATIONAL CREDIT UNION ADMINISTRATION

OPINIONS BELOW

The opinion of the court of appeals on the merits (Pet. App. 1a-14a) is reported at 90 F.3d 525. The opinion of the district court (Pet. App. 43a-54a) is reported at 863 F. Supp. 9. The opinion of the court of appeals addressing standing (Pet. App. 15a-31a) is reported at 988 F.2d 1272. This Court's denial of certiorari is reported at 510 U.S. 907. The district court's disposition of the standing issue (Pet. App. 32a-42a) is reported at 772 F. Supp. 609. A subsequent opinion of the district court enjoining the National Credit Union Administration (NCUA) from

continuing to implement its interpretation of the Federal Credit Union Act (Pet. App. 55a-62a) and an order clarifying the injunction (Pet. App. 63a-65a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1996. A petition for rehearing was denied on October 23, 1996. The petitions for writs of certiorari were filed on November 26, 1996, and November 27, 1996, respectively, and were granted on February 24, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1759 of Title 12, United States Code, provides in pertinent part (emphasis added):

> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; *except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.*

Section 702 of Title 5, United States Code, provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

STATEMENT

This case presents a challenge to the National Credit Union Administration's (NCUA) interpretation of the "common bond" provision of the Federal Credit Union Act (FCUA). Since 1982 the NCUA has permitted membership in a federal credit union to consist of multiple occupational groups, so long as each group has its own common bond. Members of the banking industry, however, contend that the "common bond" provision requires that all members of a federal credit union share a single common bond.

1. a. The origins of cooperative credit associations date to mid-19th century Europe, where credit associations were established in response to the need of small entrepreneurs, wage earners, and farmers for better credit services. See General Accounting Office, *Credit Unions: Reforms For Ensuring Future Soundness* 24 (July 1991) (GAO Report).[1] The first credit unions in this country generally were formed around groups of persons who otherwise were associated with each other. *Id.* at 216. To promote their development, early in this century many States enacted laws for chartering and regulating credit unions, beginning with the Massachusetts Credit Union Act in 1909. *Ibid.*

---

[1] We have lodged with the Clerk and served on the parties copies of the following: A. Burger & T. Dacin, *Field of Membership: An Evolving Concept* (2d ed. 1992); J. Burns, *Origin of the Term Common Bond in Credit Union Usage* (1979); General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness* (July 1991) (GAO/GGD-91-85); The Secura Group, *The Credit Union Industry: Trends, Structure, and Competitiveness* (1989).

Pioneers of the credit union movement viewed credit unions as a means of satisfying the demand for loans by persons of modest financial resources—a service that was not being supplied by existing banking institutions. Credit unions enabled people who lacked the collateral for bank loans to borrow money at reasonable rates of interest and under honest and fair conditions in times of necessity or distress. J. Moody & G. Fite, *The Credit Union Movement* 33-35 (1971).

From the earliest days of the credit union movement, use of a common bond or commonality of interest was encouraged as a basis for founding a credit union. See A. Burger & T. Dacin, *Field of Membership: An Evolving Concept* 6 (2d ed. 1992) (Burger & Dacin); GAO Report at 216. It was assumed that a common bond of membership "made it cheaper for a credit committee to establish a borrower's credit worthiness, provided a sense of cohesiveness and mutual support among members, and generally promoted the financial stability of credit unions." Burger & Dacin at 8. Thus, by "focusing on founding credit unions on the basis of common bond, the credit union industry began to flourish. * * * [The common bond] proved to be a viable mechanism with which to found new credit unions and easily spread credit union principles across the United States." *Id.* at 6-7.

By 1934, after the collapse of the nation's credit markets in the Great Depression, 38 States had enacted laws to promote credit unions, many of which sought to define fields of membership in terms of "common bond." In 1932 Congress passed an analogous statute for the District of Columbia. District of Columbia Credit Unions Act, ch. 272, 48 Stat. 326; see S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934). Two years later, Congress enacted the Federal Credit Union Act, ch. 750, 48 Stat. 1216 (codified

at 12 U.S.C. 1751 *et seq.*). At that time, funds available for loans were scarce and interest rates were too high to enable persons of limited means to purchase goods on credit. See S. Rep. No. 555, *supra*, at 1, 3; H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934). Because Congress perceived that the nation's "industrial recovery depend[ed] on the buying power" of ordinary citizens, it established "a Federal Credit Union System" to "bring normal-credit resources on a cooperative basis" to people. S. Rep. No. 555, *supra*, at 1, 3; see H.R. Rep. No. 2021, *supra*, at 1-2. Small borrowers would benefit by having an alternative to banks, which often would not lend small amounts of money to persons lacking the requisite security, and to "loan sharks," who charged usurious rates. See, *e.g.*, 78 Cong. Rec. 7259 (1934) (remarks of Sen. Sheppard); *id.* at 12,224 (remarks of Rep. Luce). An expansion of credit unions would also facilitate the education of "members in matters having to do with the sane and conservative management of their own money." S. Rep. No. 555, *supra*, at 2.

Expanding access to credit unions, therefore, was a congressional priority. For despite the country's financial upheaval, in the "38 States and in the District of Columbia" where credit unions operated, there had been "no involuntary liquidations," and credit unions had compiled an "exceptional * * * record for honest management." S. Rep. No. 555, *supra*, at 2. See also 78 Cong. Rec. 7259, 12,225 (1934) (remarks of Sen. Sheppard, Rep. Patman).

Under the FCUA, each federal credit union is funded by shares purchased by its members,[2] see 12 U.S.C. 1757(6), and makes loans exclusively to its members and

---

[2] In the parlance of credit unions, deposits of funds by persons are "purchases" of "shares" by "members" of the credit union.

to other credit unions or credit union organizations. 12 U.S.C. 1757(5). The members control the credit union on a democratic basis, with each member having an equal vote regardless of the amount of money held in the institution. 12 U.S.C. 1760. A federal credit union is managed by a board of directors, a supervisory committee, and (where the bylaws so provide) a credit committee, all consisting of credit union members who serve without compensation. 12 U.S.C. 1761.[3] Although originally uninsured, credit union accounts became insured by congressional legislation in 1970. See Act of Oct. 19, 1970, Pub. L. No. 91-468, 84 Stat. 994; 12 U.S.C. 1781-1790c.

In 1970 Congress also created the NCUA and empowered it to charter, examine, and supervise federal credit unions. The NCUA generally has the authority to "prescribe rules and regulations for the [FCUA's] administration." 12 U.S.C. 1766(a). Congress intended the NCUA to "provide more flexible and innovative [credit union] regulation." S. Rep. No. 518, 91st Cong., 1st Sess. 3 (1970).[4]

---

[3] The statute permits federal credit unions to compensate one board officer. 12 U.S.C. 1761a.

[4] With the enactment of the FCUA, Congress reposed regulatory authority over federal credit unions in the Farm Credit Administration (FCA). In 1939 the FCA was transferred to the Department of Agriculture by Reorganization Plan No. 1 of 1939, § 401, 53 Stat. 1429 (set out in 5 U.S.C. App. 1). Between 1942 and 1948 the Federal Deposit Insurance Corporation (FDIC) had regulatory authority over federal credit unions. See Exec. Order No. 9148, 7 Fed. Reg. 3145 (1942); Reorganization Plan No. 1 of 1947, § 401, 61 Stat. 952 (set out in 5 U.S.C. App. 1). In 1948 Congress created the Bureau of Federal Credit Unions (BFCU) within the Social Security Administration (SSA), an agency of the Federal Security Agency (FSA). See Act of June 29, 1948, ch. 711, §§ 1, 2, 62 Stat. 1091. In 1953 the BFCU was transferred with other functions and agencies of the FSA to the Department of Health, Education and Welfare. Reorganization Plan No. 1 of 1953, § 5, 67 Stat. 632 (set out in 5 U.S.C. App. 1). In 1970 the duties of the BFCU were transferred to a newly created independent agency within the Executive Branch, the NCUA. See Act of Mar. 10, 1970, Pub. L. No. 91-206, § 6, 84 Stat. 49.

b. Since its passage in 1934, the FCUA has limited membership in a federal credit union to "groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. 1759. See ch. 750, § 9, 48 Stat. 1219. The history behind the original FCUA legislation reveals little about Congress's precise intent in using the phrase "common bond," but the requirement facilitated the expansion of credit unions, because it was "easier to promote the idea of a credit union to a group or an association whose members already had a common bond." Letter from E.F. Callahan, NCUA Chairman, to Fernand J. St Germain, Chairman of House Comm. on Banking, Finance, and Urban Aff. (Oct. 28, 1983), J.A. 41; see also Burger & Dacin at 8 (organizing credit unions around "particular groupings" was "simply easier" and involved "generally lower * * * start-up costs").

c. In response to changing economic conditions, the NCUA and its predecessors from time to time have modified their application of the common bond provision.[5] In 1982 the NCUA adopted a policy permitting the

---

[5] Thus, for example, in 1967 federal credit union regulators replaced their requirement that members of a federal credit union be "extensively acquainted" with each other with the requirement that members simply "know" one another. GAO Report at 217. A year later, regulators instituted a policy that, once a person became a credit union member, he or she could remain a member for life. *Ibid.* And in 1972 the NCUA took account of the growing phenomenon of industrial and commercial parks to permit satisfaction of the common bond requirement "if the employees are so situated that as a consequence of their employment and relationship they can be expected to effectively operate a credit union." NCUA, *Organizing a Federal Credit Union* 7

establishment of credit unions consisting of "multiple occupational * * * groups." Interpretive Ruling and Policy Statement (IRPS) 82-1, 47 Fed. Reg. 16,775 (1982). Under that policy, the agency permitted a credit union to add "distinct group[s]" to its field of membership, so long as each group had its own common bond and was within a well-defined area near the credit union's offices. IRPS 82-3, 47 Fed. Reg. 26,808 (1982).

In his 1983 letter to Representative St Germain, NCUA Board Chairman Callahan explained the important purposes served by the NCUA's policy. See J.A. 43-45. First, experience showed that "some groups were too small either by themselves or when grouped together to support a viable credit union," so a policy of permitting multiple group additions ensured that credit unions "could serve groups not otherwise eligible for a viable credit union charter." J.A. 44. Second, permitting diversification of credit union membership provided a measure of protection against "hard economic times." *Ibid*. As Chairman Callahan pointed out, "[c]redit unions that served only one employer or one industry could be forced into liquidation by plant closings or major industrial slumps." *Ibid*. By contrast, "a credit union whose membership was made of distinct groups, each group serving different employees or industries, could continue to serve its members," *ibid*., thereby furthering the FCUA's intent to promote "a national system of cooperative credit," J.A. 42.

The NCUA consolidated and restated its chartering and field of membership policy in 1989. See IRPS 89-1, 54 Fed. Reg. 31,168. At that time, the agency reaffirmed

(Sept. 1972), C.A. App. 456. The banks do not challenge those regulations as impermissible applications of the common bond requirement.

that it would permit "select group additions" to federal credit union membership. *Id*. at 31,176. The agency again made clear that "[a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond," but counseled that "[t]he group's common bond need not be similar to the common bond(s) of the existing Federal credit union." *Ibid*. The NCUA reiterated its position through a policy statement issued in 1994. See IRPS 94-1, 59 Fed. Reg. 29,066, 29,078, 29,085.

d. Nearly 3600 federal credit unions serving over 32 million people throughout the country have memberships defined by multiple occupational groups. Those credit unions hold 79% ($132 billion) of the deposits (shares) and 78% ($94 billion) of the loans of the federal credit union system.[6]

2. a. Several North Carolina banks, joined by the national trade association for the banking industry (respondents or banks), filed the present suit. The banks sought to overturn NCUA's 1989 and 1990 approvals of requests by AT&T Family Federal Credit Union (ATTF), a federally-chartered credit union headquartered in Winston-Salem, North Carolina, to expand its field of membership to include various groups of employees of small businesses chiefly based in North Carolina and Virginia. See Pet. App. 2a, 18a. All told, ATTF has approximately 111,000 members, 35% of whom are employees of AT&T (or affiliates); the rest are employees of "select employee groups" that were added pursuant to the NCUA's multiple group policy. The suit

[6] Second Declaration of David M. Marquis ¶ 5, *American Bankers Ass'n* v. *NCUA*, Nos. 96-5347 et al. (D.C. Cir) (filed Dec. 11, 1996).

alleged that the NCUA approvals violated the statutory limitation on federal credit union membership to "groups having a common bond of occupation or association." 12 U.S.C. 1759. After permitting ATTF to intervene as a defendant, the district court dismissed the respondents' claims for lack of standing. The court held that the respondents were not within the "zone of interests" protected by the FCUA. Pet. App. 36a-42a.

b. The court of appeals reversed and remanded the case for proceedings on the merits. Pet. App. 15a-31a. The court agreed with the district court that, in enacting the common bond requirement, "Congress did not * * * intend to shield banks from competition from credit unions." *Id.* at 21a. Indeed, the court found "the very notion * * * anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." *Ibid.* But while it conceded that banks were not the "intended beneficiaries" of the FCUA's common bond requirement (see *id.* at 19a), the court nonetheless decided they were "suitable challengers" to enforce the provision. *Id.* at 22a. It reasoned that, as competitors, banks had an "interest in confining [credit unions] within certain congressionally imposed limitations," including the common bond requirement, and so "[could] sue to prevent the alleged loosening of those restrictions, even if [their] interest is not precisely the one that Congress sought to protect." *Id.* at 24a.

The court noted that the Fourth Circuit in *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d 621, 626 (1986), cert. denied, 479 U.S. 1063 (1987), had previously reached a contrary result by "focus[ing] exclusively on the question whether banks' interests were intended to be protected under [the common bond provision of] the

FCUA." Pet. App. 24a n.3. The court believed, however, that this Court's "subsequent explication of the suitable challenger route to standing in *Clarke* [v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987),] emptie[d] the *Branch Bank* decision of its persuasiveness." *Ibid.*

Judge Wald concurred in the judgment on the ground that the court's application of the "suitable challenger" doctrine was controlled by circuit precedent. See Pet. App. 30a. She expressed her continuing disagreement, however, with the "suitable challenger" test as "without roots either in Supreme Court law or in the general purposes of standing." *Ibid.* (footnote omitted) (citing *Hazardous Waste Treatment Council* v. *Thomas*, 885 F.2d 918, 927-934 (D.C. Cir. 1989) (Wald, C.J., dissenting)).[7]

c. On remand, the district court granted summary judgment to NCUA and ATTF, holding that NCUA's construction of Section 1759 was "a reasonable construction of an ambiguous statute." Pet. App. 54a.

d. Again the court of appeals reversed. Pet. App. 1a-14a. The court concluded that Congress's intent to limit federal credit union membership to groups that are bound by a single common bond is "clearly discernible from the statutory text and the purpose of the statute." Pet. App. 6a. Invoking *Chevron U.S.A. Inc.* v. *Natural*

---

[7] ATTF and its trade association filed a petition for certiorari, which this Court denied. *AT&T Family Fed. Credit Union* v. *First Nat'l Bank & Trust Co.*, 510 U.S. 907 (1993). The NCUA opposed the petition for certiorari because of the interlocutory posture in which the issue came to the Court, and advised that the issue would be more efficiently handled after the merits of the case had been decided. The NCUA nonetheless agreed with the petitioners that "the respondent banks are not within the zone of interests protected by the common bond provision of the Federal Credit Union Act." 92-2010 Gov't Br. in Opp. at 5-6.

Resources Defense Council, Inc., 467 U.S. 837 (1984), the court determined that Congress had spoken "directly" and "unambiguously" to the question in a manner inconsistent with the interpretation given to it by the NCUA. Finding no ambiguity in the statutory language, the court concluded that deference was inappropriate. See Pet. App. 5a-6a.

The court reasoned that the term "common bond" in Section 1759 "would be surplusage if it applied only to members of each constituent group and not across all groups of members" in a federal credit union because "the members of a group are by definition bonded." Pet. App. 7a. Thus it found that the text of the "Act clearly forecloses" the possibility of "the employees of unaffiliated Company B * * * join[ing] the [federal credit union] at Company A." *Id.* at 8a.

The court further analyzed the statutory text by comparing use of the term "groups" in the parallel provisions of Section 1759: one involving "groups having a common bond of occupation," and the other consisting of "groups within a well-defined neighborhood, community, or rural district." Pet. App. 8a. The court noted that "[t]he statute does not allow multiple groups, each within a different neighborhood, to form a single community [federal credit union]." It thereby reasoned that "[n]or therefore can the statute consistently allow multiple groups, each drawn from a different occupation (which the NCUA equates with a different employer), to form an occupational [federal credit union]." *Id.* at 9a.

The court did not find the legislative history to be so contrary to its textual analysis as to require a different result. It rejected the NCUA's arguments that its regulations provided other limitations to the nature and structure of federal credit unions, and concluded that the over-arching purpose of the common bond requirement

was to "unite[] credit union members in a cooperative venture," a purpose that would be frustrated by the NCUA's interpretation allowing multiple unrelated groups to form an occupational federal credit union. Pet. App. 12a. Based on that reasoning, the court held that "all members of an FCU must share a common bond," and "[i]f there are multiple occupational groups within a single credit union, then it is not sufficient that the members of each different group have a bond common to that group only." *Id.* at 14a.[8] The court reversed the district court's judgment and remanded the case "for the entry of declaratory and injunctive relief, consistent with the foregoing opinion, concerning the NCUA's 1989 and

---

[8] The Sixth Circuit, with one judge dissenting, has recently issued a decision agreeing with the judgment of the D.C. Circuit. *First City Bank* v. *NCUA*, No. 95-6543, 1997 WL 174314 (Apr. 14, 1997). Unlike the D.C. Circuit, however, the Sixth Circuit rejected as "unconvincing" *all* arguments asserting that the meaning of the term "groups having a common bond of occupation or association" could be discerned from the language of the clause alone. *Id.* at *5-*6. It nonetheless found persuasive the argument that "because the occupational clause ('limited to groups having *a* common bond of occupation') is followed directly by the community clause ('groups within *a* well-defined neighborhood, community, or rural district'), and because the two share the same syntactical structure, the two ought to be interpreted consistently." *Id.* at *6. It concluded that "since the NCUA only permits community-based credit unions to be based on membership in a single group from a single neighborhood, as opposed to multiple neighborhoods, the agency [therefore] should apply the same interpretation to the occupation-based credit unions." *Ibid.* In fact, however, NCUA places no restriction on the number of groups that can comprise a community credit union. The restriction in the statute requires only that all groups in such a credit union be "within a well-defined neighborhood, community, or rural district."

1990 approvals of certain applications filed by ATTF." *Ibid.* On October 23, 1996, the court denied rehearing.[9]

SUMMARY OF ARGUMENT

I. The court of appeals' decision on standing constitutes an unwarranted expansion of this Court's test for prudential "zone of interests" standing in actions brought under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* To establish that they are within the "zone of interests" for standing under the APA, the

[9] On October 7, 1996, the American Bankers Association and two other plaintiffs filed a new action in district court seeking a temporary restraining order to prevent the addition of new select employee groups (SEGs) to all federal credit unions, as well as to bar the addition of new members to any existing group. *American Bankers Ass'n* v. *NCUA*, No. 96-CV-2312 (TPJ). The district court consolidated this new action with the existing case. On October 25, 1996, based on the D.C. Circuit's prior determination settling the meaning of the statutory common bond provision, the district court declared unlawful "membership in a federal credit union by individuals or groups of individuals who do not share a single common bond of occupation with all other members thereof." Pet. App. 61a. Accordingly, that court permanently enjoined the "National Credit Union Administration, its officers, attorneys, agents, employers, and all others in active concert or participation with it, including [ATTF and the Credit Union National Association] * * * from henceforth authorizing occupational federal credit unions to admit members who do not share a single common bond." *Ibid.* The October 25, 1996, order applies the D.C. Circuit's common bond ruling on a nationwide basis through an injunction covering the NCUA's regulation of all credit unions.

The NCUA *et al.* filed an appeal from the October 25 injunction on November 15, 1996. On December 24, 1996, the D.C. Circuit granted a stay of that portion of the district court order barring credit unions from enrolling new members of previously approved employee groups pending appeal or disposition of the petitions for certiorari.

Still pending in the district court is respondents' motion to order retroactive divestiture of groups or members who do not share a common bond with the core group.

banks must show that Congress intended to protect their interests in the common bond requirement imposed in Section 1759. *Bennett* v. *Spear*, 117 S. Ct. 1154, 1167 (1997); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Neither the language nor the legislative history of the common bond requirement indicates that it was intended to protect banks from competition. Rather, the common bond requirement exists to protect credit unions and their members by providing stability and promoting the rapid proliferation of credit unions across the country capable of bringing credit relief to the vast array of persons of lower-to-middle incomes that banks traditionally spurned.

The court of appeals acknowledged that the common bond provision was not intended to shield banks from competition from credit unions and that, in fact, the very notion seemed anomalous in light of Congress' general purpose of encouraging the formation of credit unions, which were expected to provide service to persons not being served by banks. The court erred, however, in concluding that banks had standing to contest the NCUA's interpretation of the requirement because their status as competitors made them "suitable challengers." The court's standing determination permits plaintiffs to bring claims under a statute not just when there is no affirmative indication of congressional purpose to benefit them, but when there is every indication that Congress did *not* intend to do so. Application of the "suitable challenger" test is incompatible with this Court's zone-of-interests cases, which require that the plaintiff demonstrate that Congress intended the statutory provision at issue to protect a commercial interest of the plaintiff.

In this regard, the court of appeals mistakenly concluded that Congress intended the common bond requirement to be a limitation on the growth of credit

unions, effectively restricting credit unions from competing with banks. That requirement is not an entry-restricting provision designed to protect banks or limit the size of credit unions, but rather a requirement designed to promote the growth and stability of credit unions while ensuring the responsiveness of credit unions to their members.

II. On the merits, the court of appeals also erred in overturning the agency's interpretation. It is well settled that the reasonable construction of an ambiguous federal statute by the agency charged with its administration may not be invalidated. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). In this case, the language of the common bond requirement of Section 1759—which limits "Federal credit union membership" to "*groups* having a common bond of occupation or association"—is ambiguous, as the court of appeals at first appeared to recognize: "the plural noun 'groups' could refer * * * to multiple groups in a single FCU," or "to each of the groups that forms a credit union." Pet. App. 6a. As a matter of grammar and syntax, the court of appeals erred in concluding that the phrase "groups having a common bond" should be read the same as the accompanying phrase in Section 1759, "groups within a well-defined neighborhood." The latter phrase is a prepositional phrase containing a limitation on the noun "groups" to the object of the phrase "a well-defined neighborhood." On the other hand, the participial phrase "having a common bond" has no such limiting purpose grammatically. Because that phrase would function just as readily if the noun "groups" were considered individually or in the collective, the phrase is inherently ambiguous in the context of federal credit union membership, which may be composed of one or more groups.

Under *Chevron*, therefore, the NCUA's interpretation of the common bond provision is entitled to deference. 467 U.S. at 842-843.

The NCUA's multiple group policy substantially furthers the goals of the FCUA in promoting the growth and stability of credit unions, see S. Rep. No. 555, 73d Cong., 2d Sess. 3 (1934), by placing credit union services within the reach of those businesses with too few employees to support a viable credit union by themselves and by ensuring that a single credit union will not be unduly dependent upon the fortunes of a particular company or industry. The court of appeals' interpretation frustrates those central goals of the FCUA. Finally, Congress's failure to overturn the NCUA's interpretation despite being well aware of it is further support for the reasonableness of the agency's construction of the statute.

ARGUMENT

I. BANKS LACK STANDING TO ENFORCE THE COMMON BOND REQUIREMENT IN 12 U.S.C. 1759

The FCUA itself does not provide respondents with a cause of action to enforce the common bond provision or to claim in any other way that the NCUA has misconstrued the statute. The banks assert standing to sue for alleged violations of Section 1759 under the Administrative Procedure Act, which empowers a court to "set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706.

An entity does not have standing to bring suit under the APA unless it can show that it has suffered injury in fact and thus has been adversely affected or aggrieved by agency action, and that the injury of which it complains "falls within the 'zone of interests' sought to be protected

by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). See also *Bennett* v. *Spear*, 117 S. Ct. 1154, 1167 (1997); *Air Courier Conference of America* v. *American Postal Workers Union*, 498 U.S. 517, 523-524 (1991). The essential inquiry posed by the zone-of-interests test is one of congressional intent: whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency action. *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Accordingly, "where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Ibid*.

A. Banks Are Not Within The Zone Of Interests Of The Common Bond Requirement

1. To establish that they fall within the zone of interests sufficient for standing, respondents must demonstrate that "their commercial interest was sought to be protected by the [common bond requirement]—the specific provision which they alleged had been violated." *Bennett*, 117 S. Ct. at 1167. The particular language of the common bond provision, however, provides no support for respondents' assertion that Congress intended to protect banks from competition. Banks are nowhere mentioned in Section 1759. Nor does the language otherwise reveal any concern with the commercial interests of banks. Rather, the provision relates exclusively to the internal composition and governance of credit unions. Especially when viewed in light of the Section's previous clause broadly permitting credit union membership to "consist of the incorporators and such other persons and

incorporated and unincorporated organizations * * * as may be elected to membership," the requirement that credit union membership consist of "groups having a common bond of occupation or association" indicates that the congressional concern was with facilitating the formation and stability of credit unions by identifying particular groupings around which credit unions could form. Properly read, the common bond provision is a prerequisite to the formation of a credit union and is designed to advance its economic feasibility. See 12 U.S.C. 1754 (requiring federal regulator to determine "the economic advisability of establishing the proposed federal credit union" before approving the organization certificate).

2. Nor does the history of the common bond provision suggest that it was intended for the benefit of the banking industry. As the court of appeals acknowledged, there is "no indication" that Congress was, at the time it enacted the common bond requirement in 1934, "concerned about the competitive position of banks." Pet. App. 22a. See also *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d 621, 626 (4th Cir. 1986) ("There is no evidence from any source * * * that Congress * * * intended by this provision to protect the competitive interests of banks."). Instead, the legislative history confirms that the common bond provision was designed to "advanc[e] the formation of credit unions among groups that may realistically operate with unity of purpose" and whose managers would "possess a common interest or occupation with the membership they serve." *Ibid*. See S. Rep. No. 555, *supra*, at 2-3; 77 Cong. Rec. 3206 (1933) (remarks of Sen. Sheppard). Such an arrangement was presumed to make credit unions "incapable of exploitation." S. Rep. No. 555, *supra*, at 3. Moreover, by ensuring "both that those making lending

decisions would know more about applicants and that borrowers would be more reluctant to default," the common bond requirement specifically was "designed to benefit the members—particularly potential borrowers—of credit unions." Pet. App. 21a-22a.

In those ways, the common bond requirement supported "Congress' general purpose * * * to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." Pet. App. 21a. As the court of appeals noted, that purpose is inconsistent with the notion that the common bond requirement was intended to shield banks from competition from credit unions. *Ibid.* The collapse of the nation's banking system in 1929 created a scarcity in funds available for loans; interest rates rose to usurious levels. S. Rep. No. 555, *supra*, at 3. Such high interest rates sharply reduced or eliminated the ability of many individuals, particularly the poor, to purchase goods on credit. *Id.* at 1, 3. Congress perceived that the Nation's "industrial recovery depend[ed] on the buying power" of as broad a sector of the American public as possible. *Id.* at 1. Congress also viewed banks as the principal culprits in the onset of the Great Depression and saw credit unions as alternatives to the "[c]ompetitive behavior by banks" that "lent recklessly to speculative ventures." A. Schwartz, "Financial Stability and the Federal Safety Net," in W. Haraf & R. Kushmeider, eds., *Restructuring Banking and Financial Services in America* 43 (1988). Accordingly, Congress designed the federal credit union system to "bring normal-credit resources on a cooperative basis" to persons "whose buying power is now so often dissipated in high-interest charges." S. Rep. No. 555, *supra*, at 1, 3.

Congress believed that a national credit union system would benefit lower-to-middle income families by providing them with an alternative to both banks and "loan sharks." See, *e.g.*, 78 Cong. Rec. 7259, 12,224 (1934) (remarks of Sen. Sheppard, Rep. Luce). Banks did not meet the credit needs of the vast majority of borrowers, who typically lacked adequate security to support a loan or who sought funds in amounts too small to justify a loan. *Id.* at 7259. Licensed money lenders, on the other hand, were certainly willing to lend small amounts to borrowers of modest means, but they charged exploitive rates of interest, since the usury laws of most States permitted interest rates of up to 42% per year. *Id.* at 12,224.

Congress, therefore, recognized that credit unions provided an attractive alternative to the existing credit system by permitting members "with their own money and under their own management to take care of their own short-term credit problems." S. Rep. No. 555, *supra*, at 2. The buying power of the people would thus be released towards the recovery of the nation's economy, instead of being eaten up by excessive interest charges. See *id.* at 1. Congress intended to establish a national system of credit unions as quickly as possible, and viewed credit unions as "capable of rapid mass development [because] they have to do with problems which affect the masses of the people." *Id.* at 2. And even though most States had laws providing for credit unions, the "need for much more rapid national development is * * * very great" because Congress understood that the "consumer-credit problem is a national problem which has no State limitations." *Id.* at 3-4. See also *First City Bank* v. *NCUA*, No. 95-6543, 1997 WL 174314, at *1 (6th Cir. Apr. 14, 1997) ("[i]n effect, the Federal Credit Union Act created a localized and liberalized system of federal credit services * * * [that enabled] the federal government to make credit available to millions of working class Americans")

(quoting *TI Federal Credit Union* v. *DelBonis*, 72 F.3d 921, 931-932 (1st Cir. 1995)).

Far from being designed to limit development of credit unions, therefore, the common bond requirement was intended to jump-start credit unions. Congress perceived that credit unions would be formed more quickly if existing groups with common interests and relationships could be induced to pool their resources. The common bond requirement ensures the ready formation of credit unions and their continuing economic viability as institutions able to provide people across the country with an alternative source of financial services. Congress did not intend the common bond requirement to secure a competitive advantage for banking institutions.

B. The Court Of Appeals' "Suitable Challenger" Analysis Unwarrantedly Expands The Zone Of Interests Test

Although it acknowledged that banks are not "intended beneficiaries" of the common bond provision, see Pet. App. 23a, the court of appeals nonetheless held that banks are "suitable challengers" to enforce the FCUA's common bond requirement because there is "a reason to think" that the banks' interest in "patrolling a statutory picket line will bear *some* relation to the congressional purpose" underlying the statute. *Id.* at 28a (emphasis added). The court of appeals' standing determination thus permits plaintiffs to bring claims not only when the pertinent statutory provision evinces no clear purpose to benefit them, but also, paradoxically, when Congress gave every indication that its statutory purpose was to fill a commercial void caused because entities of the plaintiffs' type disdained serving the very persons Congress sought to benefit through the legislation. Furthermore, the banks assert standing as challengers to

the NCUA's interpretation not to deny any person or group access to membership in a federal credit union, but rather to regulate *which* credit unions different groups may join.

1. The court of appeals' holding is incompatible with the Court's zone-of-interests cases. This Court has required that a plaintiff demonstrate that Congress intended to protect the plaintiff's commercial interests in the statutory provision, the violation of which formed the legal basis for the complaint. See, *e.g.*, *Bennett*, 117 S. Ct. at 1167 (The provision of Endangered Species Act requiring each agency to "use the best scientific and commercial data available" when proposing action to protect endangered species was "intended to prevent uneconomic (because erroneous) jeopardy determinations [and] [p]etitioners' claim that they [were] victims of such a mistake is plainly within the zone of interests that the provision protects."); *Clarke*, 479 U.S. at 403 (The commercial interest asserted by the trade association, whose members compete with banks in providing discount brokerage services, was within the zone of interests of provisions of the National Bank Act limiting locations in which banks can have branches since the point of those provisions was, in part, to "limit[] the extent to which banks can engage in the discount brokerage business."); *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 155-156 (1970) (Data processing companies had standing as competitors to contest the legality of a ruling by the Comptroller of the Currency permitting national banks, as an incident to their banking services, to make data processing services available to other banks and to bank customers, because the plaintiffs' commercial interest specifically was sought to be protected by the anti-competition limitation contained in Section 4 of the Bank Service Corporation Act of 1962,

Pub. L. No. 87-856, 76 Stat. 1132.). The banks, therefore, must show that Congress intended to protect their interests when it promulgated the common bond requirement in the FCUA. Yet nothing in the language or history of the common bond provision evinces an intent to protect banks from competition with credit unions.

Contrary to the D.C. Circuit's approach, this Court's cases have eschewed any endorsement of the "suitable challenger" test adopted by the D.C. Circuit. In *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517 (1991), unions representing postal employees challenged a decision by the United States Postal Service to permit private companies to engage in certain mailing practices, a decision the plaintiffs claimed violated the postal monopoly created by the Private Express Statutes (PES). Using an analysis similar to the one it employed below in this case, the D.C. Circuit in *Air Courier* had upheld the unions' standing to sue because "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities." 498 U.S. at 524 (quoting *American Postal Workers Union, AFL-CIO* v. *United States Postal Serv.*, 891 F.2d 304, 310 (D.C. Cir. 1989) rev'd, 498 U.S. 517 (1991)). This Court rejected that view as "mistaken, for it conflates the zone-of-interests test with injury in fact." 498 U.S. at 524. Instead, the Court stated, it must inquire "as to Congress' intent in enacting the PES in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes." *Ibid.* The Court found no evidence that the statutes were intended for the benefit of the putative plaintiffs, *id.* at 524-525, and concluded that the plaintiffs lacked standing. The Court further noted that nothing in its decision in *Clarke* had changed

the longstanding principles upon which "zone-of-interests" standing should be analyzed. See, *e.g.*, 498 U.S. at 523-524, 529. The court of appeals' "suitable challenger" doctrine cannot be squared with the Court's analysis of zone-of-interests standing in *Air Courier*.

2. The court below also misunderstood the legislative history of the FCUA by concluding that the common bond requirement was, "[l]ike more classic entry restrictions," intended to be a "limitation[] on growth" that effectively restricts the size of credit unions. Pet. App. 24a. The court thus viewed it as appropriate to permit banks to help enforce Congress's intent. In so doing, however, the court held an insupportable view of the common bond provision as an entry restriction. The term "common bond" is a broad one, and does not require that credit unions be small entities. Congress was well aware when it passed the FCUA in 1934 that some state credit unions had grown sufficiently large that personal knowledge of every borrower's character was impossible. See *Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 15 (1933) (statement of Roy F. Bergengren) (noting that Boston's Telephone Workers Credit Union had 16,000 members). See also 78 Cong. Rec. 7259 (1934) (remarks of Sen. Barkley) (credit unions "have been the means by which small groups of people and even larger groups of people within an industry or within an establishment have been able to establish their own credit facilities * * * [w]ithout being subject to the outrageous rates of loan sharks and others who prey upon people of that class").

Consistent even with the interpretation of the common bond provision advanced by respondents in the courts below, some credit unions today have thousands of members located throughout the United States and overseas.

Examples of such large, single-group credit unions include those formed by members of a particular branch of the military or employees of a single large corporation or organization. See, *e.g.*, NCUA, *Financial and Statistical Database* (Dec. 1996) (http://www.ncua.gov/cgiwin/cureports.exe) (Navy Federal Credit Union—more than 1.6 million members; American Airlines Federal Credit Union—more than 157,000 members). Nothing in the lower court's decision on the merits calls into question the legal validity of such credit unions, yet their existence casts great doubt on the court of appeals' assumption that the common bond requirement was a "statutory picket line" (Pet. App. 28a) to restrict the growth of individual credit unions.

Indeed, given the legal existence of large, single-group credit unions, it would be anomalous to infer that Congress intended the common bond provision to restrict the activities of credit unions over a carefully circumscribed market segment. Quite apart from the lack of any evidence of such a purpose, the court's decision directly conflicts with Congress's aim of promoting the rapid expansion of credit unions across the country so that persons not being served by banks could obtain credit relief. The common bond requirement facilitated that process by encouraging groups having a common bond to form credit unions. Consequently, the lower court's interpretation of the common bond requirement's purposes—to limit credit unions while protecting banks—is illogical. See *Branch Bank*, 786 F.2d at 626 (rejecting suggestion that common bond provision was "a congressionally mandated fetter on the operation of the Act designed to 'protect competitors'").

C. Other Suitable Plaintiffs With Standing To Sue Exist

"The assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974). Thus, even if no other potential plaintiff had standing to sue for an allegedly erroneous interpretation or application of the common bond provision, the banks would still lack standing. If that were the case, the banks' lack of standing would simply mean that Congress has committed the issue to the political process for resolution, *ibid.*, a process in which banks are hardly without influence. See *Branch Bank*, 786 F.2d at 626.

In any event, there are other potential plaintiffs who would have standing to challenge the NCUA's actions under the APA. The statutory text and legislative history demonstrate that the intended beneficiaries of the common bond provision are the very credit union members whose interests the requirement was designed to protect. Obviously, "[i]f the NCUA were seen to violate the common bond requirement to the detriment of union members, they would possess standing to sue." *Branch Bank*, 786 F.2d at 626. Credit union members are fully capable of bringing their own challenges to expansions that they believe deprive the credit union of the common bond necessary to ensure success. See, *e.g.*, *Casazza* v. *Department of Commerce*, 350 N.W.2d 855 (Mich. Ct. App. 1984) (seven members of state credit union challenged decision of Michigan's state agency having control over state credit unions to approve bylaw amendment for Ann Arbor Co-op Credit Union that significantly expanded union's field of membership).[10] Banks simply do

[10] Credit union members and directors have sued to challenge field-of-membership determinations by the NCUA. See, *e.g.*, *Board of*

not occupy a similar position. *Branch Bank*, 786 F.2d at 626. Accordingly, the decision by the court below should be reversed and the case dismissed because respondents have no standing under the APA to challenge the NCUA's charter amendment decisions in this case.

II. THE NCUA'S SELECT GROUP POLICY IS BASED ON A REASONABLE READING OF THE FEDERAL CREDIT UNION ACT

If, contrary to our submission above, the Court concludes that the lower courts properly entertained this suit, the judgment below should nonetheless be reversed because the court of appeals misapplied *Chevron* in failing to defer to the NCUA's reasonable interpretation of the FCUA's common bond provision. The *Chevron* decision requires that courts undertake a two-step process in reviewing an agency's interpretation of a statute it is entrusted to administer. The first step is to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If the intent of Congress is clear, courts must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. However, if "the court determines Congress has not directly addressed the precise question at issue"—"if the statute is silent or ambiguous"—then "the question for the court is whether the agency's answer is based on a permissible construction." *Id.* at 843.

Directors & Officers, Forbes Fed. Credit Union v. *NCUA*, 477 F.2d 777 (10th Cir. 1973) (directors challenged NCUA's narrow interpretation of field-of-membership provision of credit union's charter); *National Alliance of Postal & Fed. Employees* v. *Nickerson*, 424 F. Supp. 823 (D.D.C. 1976) (national labor organization representing approximately 40,000 postal workers challenged NCUA's refusal to grant federal credit union charter because of potential overlap with United States Postal Service Federal Credit Union).

As this Court has emphasized, in upholding the agency's interpretation, a "court need not conclude that the agency construction was the only one it permissibly could have adopted * * *, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." 467 U.S. at 843 n.11. It need only be a "reasonable choice within a gap left open by Congress." *Id.* at 866. Moreover, an agency's interpretation is entitled to deference even though it may represent a revision of prior views. See *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1734 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal * * * since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."). Agencies are not required to "establish rules of conduct to last forever"; rather, they must have "ample latitude to adapt their rules and policies to the demands of changing circumstances." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (internal quotation marks omitted). See generally *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991).

A. The Common Bond Provision Is Ambiguous In Defining The Field of Membership In Federal Credit Unions

1. By limiting federal credit union membership to "*groups* having a common bond of occupation or association," 12 U.S.C. 1759 (emphasis added), the FCUA does not unambiguously prohibit the possibility that membership in a federal credit union may consist of more than one employee group, each with its own common bond. The reference to "a common bond" can apply as readily to each of the groups within the credit union as to all of those groups together. The court of appeals

initially appeared to recognize the ambiguity in the statutory language: "the plural noun 'groups' could refer * * * to multiple groups in a single FCU," or "to each of the groups that forms a credit union." Pet. App. 6a. See *First City Bank*, 1997 WL 174314, at *8 (Jones, J., dissenting) ("The statute does not clearly establish the unambiguous congressional intent concerning the common bond requirement."). And in rejecting the parties' constructions of the statute, the court below noted that "[t]he article 'a' could as easily mean one bond for each group as one bond for all groups in [a federal credit union]." Pet App. 6a. Notwithstanding its seeming recognition of the statute's ambiguity, however, the court ultimately concluded that Congress left no doubt as to the meaning of the common bond provision.

2. As a grammatical matter, the phrasing "groups having a common bond" supports three reasonable interpretations in the context of a federal credit union's membership: (1) a single group may have a single common bond; (2) multiple groups may each have their own common bonds; and (3) multiple groups may have a single common bond. See generally *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (construction is "mandated" by "the grammatical structure of the statute"). The phrase "having a common bond" is a participial phrase that describes the noun "groups." When a single group comprises the members of a federal credit union, it would be natural to describe that group as "having a common bond." Yet when multiple groups compose the credit union's membership, the singular adjectival form, "having a common bond," is necessarily

ambiguous, because it could describe the "groups" individually or collectively.[11]

In failing to appreciate the inherent ambiguity of the participial phrase used by Congress, the court below and the Sixth Circuit in *First City Bank* committed another grammatical mistake by finding the phrase "groups having a common bond" analogous to the adjoining field-of-membership limitation phrase, "groups within a well-defined neighborhood, community, or rural district." See Pet. App. 8a-9a; *First City Bank*, 1997 WL 174314, at *6. Both courts read the two phrases in the statute as though they had the same syntactical structure (*i.e.*, plural groups followed by a singular phrase). See *ibid.* That reading, however, misunderstands the different parts of speech employed in the two phrases. The phrase "groups having a common bond" is an example of a noun being described with a participial phrase. The phrase "groups within a well-defined neighborhood," on the other hand, is a prepositional phrase that imposes a limit on the noun. The word "within" used as a preposition means "in the inner part or interior of, inside of, in," or "with emphasis on the restriction or confinement by limits or boundaries: In the limits of, not outside or beyond." 12 *The Oxford English Dictionary* 222 (1933). Whereas a participial phrase will be used to describe the noun to which it is attached, the prepositional phrase in

---

[11] Nor is the example of this phrasing unique to the FCUA. The meaning of the phrase "groups having a common surname" is ambiguous as to whether all of the groups or each group individually must have the same surname. The same is true for the following examples using other participial phrases: "groups sharing a common cause of action"; "groups displaying a common hairstyle"; and "groups speaking a common language." See generally H.W. Fowler & F.G. Fowler, *The King's English* 119 (1931) (describing improper participial phrases as "one of the blunders most common" in English usage).

Section 1759 shows the relationship of the noun "groups" to the object of the preposition, "a well-defined neighborhood." Thus, it is syntactically sound to interpret the neighborhood provision as requiring that all constituent groups be within a single geographical area, because the prepositional phrase serves as a limit on the noun "groups." It is also syntactically sound to construe the occupational provision as permitting each group to be characterized by its own common bond, because the participial phrase "having a common bond of occupation" describes the "groups" either individually or collectively.[12]

Certainly Congress could have chosen a clearer method of expressing its intent. The phrase "groups, each of which must have its own common bond," would be as clear in one direction as "groups, all of which must share a single common bond," would be in the other. But the statutory language chosen by Congress conveys no such clarity, and that inherent ambiguity leaves open reasonable interpretations enabling the regulatory agency to adapt to changing social and economic circumstances.[13]

---

[12] In demonstrating the ambiguity of the phrase "groups having a common bond" it is important to note that putting the participial phrase in the plural form (*i.e.*, "groups having common bonds") is not necessarily a solution to the ambiguity in the statute. The plural form does not clarify the ambiguity created by the singular form, because it is no more certain whether the "common bonds" must characterize each group or all of the groups in a credit union. Indeed, the plural form merely introduces yet another ambiguity into the text: whether the members of each constituent group must have more than one common bond. In selecting a participial phrase to serve as the adjective to a plural noun, Congress necessarily created ambiguity.

[13] The ambiguity of the common bond provision was recognized by the General Counsel of the Farm Credit Administration as early as 1940, when he wrote that "[p]lainly[,] the expression 'groups having a common bond of occupation, or association,' does not by its own terms define itself with sufficient particularity to facilitate its application in all of the situations in which its application may be necessary." FCA Gen. Counsel, Legal Op. No. 754-A (Sept. 24, 1940), at 1.

3. The disparate views of the parties, the courts below, and the majority and dissent in *First City Bank* belie the court of appeals' ultimate conclusion that the language of the common bond provision is unambiguous. Similarly, the fact that the court below and the Sixth Circuit in *First City Bank* do not share a common interpretation of the language further suggests that Congress did not speak unambiguously with respect to the common bond provision. See *Smiley*, 116 S. Ct. at 1732-1733 (in light of different views on meaning of statutory term reflected in multiple dissents and conflicting opinion from another court, "it would be difficult indeed to contend that the [relevant statutory term] is unambiguous with regard to the point at issue").

Indeed, the only way the court below could discern a lack of ambiguity in the statute was to introduce three terms not found in the textual phrase "groups having a common bond of occupation or association": "In sum, the FCUA requires by its terms that all *members* of a credit union *share* a *single* common bond." Pet App. 10a (emphasis added). By reformulating the statutory text, therefore, the court's decision underscores that the language in the statute itself does not unambiguously answer the precise question of whether Congress intended to prohibit federal credit union membership based on multiple occupational groups. The court thus erred in not assessing the reasonableness of the NCUA's interpretation under a *Chevron* step two analysis.

B. The NCUA's Construction Is A Reasonable Interpretation Of The Statutory Language

If this Court agrees with petitioners that the statutory language is ambiguous, it must uphold the NCUA's interpretation. The respondent banks have argued in this case only that the statutory language is unambiguous; they have not challenged the reasonableness of the NCUA's construction in the event the statute is found to be ambiguous. See Pet. App. 6a, 23a. The NCUA's interpretation of the common bond provision is consistent with the language of the statute.

1. The statute's use of the plural form of the word "group" is sufficient, in and of itself, to support the NCUA's judgment that the membership of a federal credit union may have more than one group. Thus, viewed as a limit on membership, the term "groups" makes clear that more than one group can form a federal credit union.

That reading of the pertinent phrase draws further support from the language of the opening portion of Section 1759, which establishes that Congress's reference to "Federal credit union membership" was intended to refer to membership in a single credit union that might include multiple "groups." Section 1759 begins by specifying that "Federal credit union membership" shall consist of "the incorporators and such other persons and * * * organizations" who shall "subscribe to at least one share of *its* stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors." 12 U.S.C. 1759 (emphasis added). The word "its" refers back to the term "credit union" as used in the initial phrase, "Federal credit union membership." Those requirements apply to a single credit union. When Congress later referred to "groups" in Section 1759 in the context of "Federal credit union membership," it

similarly intended to embrace a single federal credit union. There is no reason to think that Congress used the phrase in any different manner when it set forth the common bond requirement later in the same sentence. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). Accordingly, it was entirely reasonable for the NCUA to read the common bond provision to permit "a credit union" to be composed of several member groups, each with its own common bond.

Given that the statute permits, but does not require, multiple groups within a single federal credit union, the NCUA has reasonably interpreted the phrase "a common bond" to apply to each of those groups, rather than necessarily across the multiple groups that may compose the credit union's field of membership. Just as the statute does not read "groups, each of which has a common bond," it also does not read "groups that together share a single common bond," as the court of appeals essentially held.

2. In finding the NCUA's interpretation "unconvincing," the court of appeals erroneously concluded that the term "common bond" as used in the FCUA would be rendered "surplusage" by the agency's construction. See Pet. App. 6a-7a. The court's analysis is flawed in several respects.

First, relying on a dictionary definition of "group" as "an 'assemblage . . . having some resemblance or common characteristic,'" the court concluded that "a common bond is implicit in the term 'group.'" Pet. App. 7a (quoting *Webster's New Int'l Dictionary* 955 (1927) (definition 4)). Another definition from the same dictionary, however, contains no such requirement of commonality in its definition of "group": "An assemblage of per-

sons or things regarded as a unit because of their comparative segregation from others; a cluster; aggregation; as, a *group* of trees or of islands." *Webster's New Int'l Dictionary* 955 (definition 3). Thus, a group can simply mean "a cluster," or an "aggregation." *Ibid.* By contrast, a "bond" connotes a more substantial connection between individuals—a "uniting" or "cementing" force. 1 *The Oxford English Dictionary* 981 (1933); accord *Webster's, supra*, at 251 (a "bond" is "[a] binding force or influence," or "a uniting tie"). Under the NCUA's interpretation, the requirement that group members have a "common bond" is *in addition* to their being part of a "group." To join an occupational credit union under the NCUA policy, a group must show not just that it is defined by an occupational characteristic, but that its members are connected to one another in a relationship sufficiently substantial to qualify as a "common bond." The agency's interpretation thus gives meaning to "groups" and "common bond," and renders neither term redundant.[14]

Second, the court's construction neglects other important words in the statutory provision. For example, if "a common bond is implicit in the term 'group,'" and all members "must share a common bond," Pet. App. 7a, then all members of a federal credit union ultimately must be members of a single encompassing group. But the FCUA limits federal credit union membership to "*groups* having a common bond of occupation or association." 12 U.S.C. 1759 (emphasis added). The

[14] The NCUA's regulations expressly recognize the difference between the characteristics that may define a group, and those that satisfy the common bond provision. Thus, the agency does not permit a federal credit union to represent, for instance, "[p]ersons employed or working in Chicago, Illinois," because such an occupational group is insufficiently defined. See IRPS 94-1, 59 Fed. Reg. at 29,076.

court suggested that "the plural noun 'groups' could refer not to multiple groups in a single FCU but to each of the groups that forms a credit union." Pet. App. 6a. The statutory text and the context in which it appears make clear that more than one group can join a single federal credit union.

Finally, the fact that the statute limits community federal credit union membership to "groups within a well-defined neighborhood, community, or rural district," 12 U.S.C. 1759, does not support the lower court's conclusion that the statute is unambiguous. See Pet. App. 9a. The NCUA interprets that provision to restrict a community federal credit union's field of membership to a single geographical area, but not to preclude multiple groups in a single community-based credit union. The agency's construction stems from the requirement that a community-based federal credit union serve groups "within" a well-defined locale, and not because the word "groups" means something different in the common bond provision than in the community field-of-membership provision.[15]

3. The common bond provision is a precondition, but not a guarantee, of federal credit union membership. As the statute provides in Section 1754, the NCUA (as did its predecessors) has discretion to grant a request for a charter only if the prospective credit union applicant can demonstrate the "economic advisability" of granting the charter. See 12 U.S.C. 1754. Section 1759 specifically

[15] The NCUA's chartering standards also contain special provisions to facilitate service to low-income groups. Those provisions permit a non-contiguous low-income group to join a community credit union, and include a more expansive common bond standard to enable occupationally-based credit unions to provide service to such groups, which otherwise would have difficulty obtaining credit. See NCUA, *Chartering and Field of Membership Manual* 1-17 to 1-19 (1994).

confers discretion on the regulating agency to fix the "rules and regulations" determining the requirements for federal credit union membership. 12 U.S.C. 1759. In light of that specific rulemaking authority, it is especially appropriate for the courts to defer to the agency's reasonable construction of the overall common bond phrase contained in Section 1759, just as the courts must defer to the agency's determination of whether the interests advanced by prospective members are sufficiently strong to constitute a "common bond," because that term is not defined in the statute. See, *e.g.*, *Chevron*, 467 U.S. at 843-844; *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977).

C. The NCUA's Interpretation Promotes The Congressional Purposes Expressed In The FCUA

Congress enacted the FCUA to promote a "form of credit organization capable of reaching the masses of the people." S. Rep. No. 555, *supra*, at 3. The FCUA also was designed to "promote the growth of credit unions" and "enhance credit union stability." See *Community First Bank* v. *NCUA*, 41 F.3d 1050, 1054 (6th Cir. 1994). The NCUA's multiple employee group policy directly advances those goals by permitting employees of small businesses to gain access to credit union services even though they might not have enough potential members to establish a viable stand-alone institution and by ensuring that a single credit union will not be unduly dependent upon the fortunes of a particular company or industry. The court of appeals' decision, by contrast, thwarts the attainment of those statutory goals.

Notwithstanding the legislative history documenting the congressional purpose of enhancing the growth potential of federal credit unions, the court below believed that too much growth would hamper the ability

of a credit union to "be a cohesive association," and thus negate a key distinction between banks and credit unions, the latter of which "could 'loan on character.'" Pet. App. 11a (quoting *First National Bank*, Pet. App. 22a). But the court failed to recognize that the NCUA's select employee group policy achieves that objective, because only employees of carefully selected employers may join a federal credit union. IRPS 89-1, 54 Fed. Reg. at 31,169. Moreover, the common bond requirement continues to ensure that, unlike a bank, a federal credit union may not open an account for any individual who seeks the credit union's services. Instead, only individuals who are part of qualifying groups under the NCUA's field-of-membership terms are entitled to credit union services. See *United States* v. *Michigan*, 851 F.2d 803, 807 (6th Cir. 1988) ("Whereas almost all private business will serve any customer, the 'customers' of each federal credit union, its members, are expressly 'limited to groups having a common bond.'") (quoting 12 U.S.C. 1759).

Second, the court of appeals' analysis (Pet. App. 11a) of the growth in size of certain multiple-group credit unions misunderstands the FCUA and its legislative history. By its own terms, the FCUA places no limitation on the size of a federal credit union, and Congress was fully aware of that fact when it passed the statute in 1934. See *Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 15 (1933). Thus, as we demonstrated in discussing the standing issue (see pages 20-23, 25-27, *supra*), to the extent the common bond requirement is viewed as a "restriction" on federal credit unions, its purpose is to ensure the financial viability (and not to limit the expansion) of them. That purpose is aided, not hindered, by the NCUA's multiple group policy, particularly given the numerous small businesses whose

employees otherwise face considerable obstacles to obtaining credit union services. According to recent Bureau of the Census data, approximately 56% of all workers employed in the United States (approximately 78 million) aged 15 years and older are employed in a firm that has fewer than 500 employees. See United States Dept. of Commerce, Bureau of the Census, *1996 Statistical Abstract of the United States* 430. Under the court of appeals' ruling, the ability of workers in such enterprises to join federal credit unions under the existing NCUA policy would be thwarted, because the NCUA has determined that credit unions of less than 500 members are unlikely to be economically viable. See NCUA, *Chartering and Field of Membership Manual* 1-12 (1994).

Third, in concluding that the common bond requirement was intended to ensure that all members of a credit union "are known by the officers and by each other" (Pet. App. 11a), the court's emphasis on members knowing each other is anachronistic. Modern technology and the widespread availability of credit information have greatly lessened the necessity for lending officials to be personally acquainted with a borrower to evaluate his or her credit-worthiness or the likelihood that a loan will be defaulted. As interpreted by the NCUA, the common bond requirement serves an important purpose by ensuring that each group within a particular credit union has a cohesive link among its members. That link strengthens the commitment of group members to the success of the credit union. The NCUA's policy simply does not require that there be a single link binding together all of the members of the various groups composing a credit union.

Finally, the NCUA's 1982 modification of the common bond policy was a legitimate response to the volatile

economic conditions of the late 1970s and early 1980s that dramatically slowed the rate of growth for all financial institutions, but especially for credit unions. Burger & Dacin at 29. The revision of the common bond policy allowed groups to join existing credit unions if they did not have the number of members necessary to make an individual credit union economically feasible. In that way,

> [t]he revision protected against two potential problems. First, it allowed credit unions to shield themselves from the economic consequences of wide-spread layoffs or plant closings of a particular employer. Second, it allowed credit unions to create economies of scale to provide services to its members in the most cost effective manner available. Without the more expansive interpretation of the common bond provision many credit unions would have failed, and many other groups would not have been able to attain credit union services. These effects would have been clearly inconsistent with the Congressional intent to make credit available to those with limited means.

First City Bank, 1997 WL 174314, at *11 (Jones, J., dissenting).

D. The NCUA's Reasonable Interpretation Is Entitled To Deference

1. Because of the ambiguity of the statute, the reasonableness of the NCUA's interpretation, and the congruity of that interpretation with the congressional purposes underlying the FCUA, the court below erred in not deferring to the agency under a *Chevron* step two analysis. Under *Chevron*, 467 U.S. at 843, "courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with

the enforcement of that statute." *Clarke*, 479 U.S. at 403 (quoting *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 626 (1971)). The court of appeals nonetheless concluded that it "[was] not required to grant any particular deference to the [NCUA's] parsing of statutory language or its interpretation of legislative history" when attempting to discern congressional intent "from the statutory text and the purpose of the statute." Pet. App. 6a (quoting *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984)). This Court, however, has rejected the proposition that *Chevron* deference is inapplicable to "a pure question of statutory construction" and to the agency's interpretation of the purposes underlying the statute. *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). See also *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) ("If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.' ").

Moreover, even though the court of appeals maintained that this case fell "under step one of *Chevron* only," Pet. App. 6a, it used a *Chevron* step two analysis. The court rejected as unconvincing the syntactical arguments made by the parties. *Ibid*. Then it determined that "the term 'common bond' would be surplusage if it applied only to the members of each constituent group and not across all groups of members in an FCU." *Id*. at 7a. Finally, it concluded that the two phrases, "groups having a common bond of occupation" and "groups within a well-defined neighborhood, community, or rural district," must be interpreted in a consistent way. *Id*. at 8a-9a. Those conclusions, however, are not *compelled* by the words and syntax of the statute. The view that one reading of the term "common bond" makes more sense

than another, or that the terms of the occupational and community-based clauses should be interpreted consistently, "go[es] to the reasonableness of the NCUA's interpretation of the statute rather than to a consideration of whether the words of the statute are clear on their face." *First City Bank*, 1997 WL 174314, at *8 (Jones, J., dissenting). Thus, the court of appeals improperly substituted its construction of the FCUA for a reasonable one made by the agency charged with administering the statute.

2. The reasonableness of the NCUA's interpretation is further supported by the pattern of Congress's action in the wake of the NCUA's 1982 interpretive revision. From the inception of the NCUA's revised common bond interpretation, Congress has been made aware of the agency's policy by the NCUA itself, lobbyists on behalf of the banking industry, and the General Accounting Office (GAO).[16] Despite amending the FCUA numerous times

---

[16] See, *e.g.*, *Annual Report of the National Credit Union Administration* 1 (1982), C.A. App. 527; Callahan Letter, *supra*; *Community Investment Practices of Credit Unions: Hearings Before the Subcomm. on Consumer Credit and Ins. of the House Comm. on Banking, Fin. and Urban Affairs*, 103d Cong., 2d Sess. 121 (1994) (testimony of Richard L. Mount on behalf of the Independent Bankers Association of America, complaining that, since 1989, the NCUA "has been unraveling" the common bond requirement, "expand[ing] the common bond rule to permit virtually unlimited membership"); *id.* at 179 (testimony of C. Kendric Fergeson on behalf of the American Bankers Association, objecting to "competitive advantages of credit unions and the erosion of the common bond," which have increased their "ability to compete with banks"); *Unrelated Business Income Tax: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 1883 (1987) (comments of the American Bankers Association, objecting to NCUA's expanded application of the common bond requirement as unfair because it "allow[ed] credit unions to compete with banks and savings and loans for

since 1982, Congress has never altered the text of the common bond provision.[17]

The legislative history of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, illustrates

---

customers among the general public," and complaining that the common bond requirement already "had been loosely interpreted for many years before [1982]"); *Revenue Increase Options: Hearings Before House Comm. on Ways and Means*, 100th Cong., 1st Sess. Pt. I, at 507 (1987) (testimony of Gerald B. Franceski, The Bankers Committee for Tax Equality, expressing his perception that "the deterioration of 'common-bond' requirements for credit union membership [that] allow credit unions to compete with banks and savings and loans for customers among the general public"); GAO Report at 218-219.

[17] See Act of Jan. 12, 1983, Pub. L. No. 97-457, §§ 25-29, 96 Stat. 2510-2511; Secondary Mortgage Market Enhancement Act of 1984, Pub. L. No. 98-440, § 105(b), 98 Stat. 1691 (Oct. 3, 1984); Housing and Community Development Technical Amendments Act of 1984, Pub. L. No. 98-479, § 206, 98 Stat. 2234 (Oct. 17, 1984); Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, §§ 701-716, 101 Stat. 652-656 (Aug. 10, 1987); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub L. No. 101-73, Tits. IX, XII, 103 Stat. 446, 519 (Aug. 9, 1989); Support for East European Democracy (SEED) Act of 1989, Pub. L. No. 101-179, § 206, 103 Stat. 1310 (Nov. 28, 1989); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, Tit. III, 103 Stat. 864 (Nov. 9, 1989); Crime Control Act of 1990, Pub. L. No. 101-647, Tit. XXV, 104 Stat. 4859 (Nov. 29, 1990); Federal Deposit Insurance Corporation (FDIC) Improvement Act of 1991, Pub. L. No. 102-242, §§ 251, 313, 105 Stat. 2331, 2368 (Dec. 19, 1991); Housing and Community Development Act of 1992, Pub. L. No. 102-550, §§ 1501- 1504, 1604-1605, 106 Stat. 4044-4051, 4081-4084 (Oct. 28, 1992); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2854, 107 Stat. 1908 (Nov. 30, 1993); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320606, 108 Stat. 2119 (Sept. 13, 1994); Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (Sept. 23, 1994).

Congress's awareness of and response to concerns that the NCUA had impermissibly broadened the scope of the common bond requirement in its 1982 revision. Section 1201 of FIRREA directed that the GAO study the credit union system, specifically ordering an examination of "whether the common bond rules regarding credit union membership continue to serve their original purpose." See 12 U.S.C. 1752a note. Congress requested that the report "contain a detailed statement of findings and conclusions, including recommendations for * * * legislative action." *Ibid.*[18]

---

[18] A prior version of that provision included language directing the GAO to examine whether "the common bond rules regarding credit union membership continue to serve their original purpose *and the extent to which recent interpretations of such rules may have contributed to the growth of credit unions*." See H.R. 1278, 101st Cong., 1st Sess. (1989) (emphasis added). The italicized language was removed prior to passage of the legislation. Banking industry representatives complained at hearings on H.R. 1278 about the breadth of the NCUA's interpretation of the common bond requirement. See *Financial Institutions Reform, Recovery, and Enforcement Act of 1989—(H.R. 1278): Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. Pt. II, at 66 (1989) (*FIRREA Hearings*) (statement of Thomas Rideout, president of the American Bankers Association). Other banking industry representatives expressed "the increasing[ ] concern[s] about the role of credit unions as tax exempt depository institutions serving an ever-enlarging marketplace outside traditional 'common-bond' constraints." *FIRREA Hearings*, *supra*, at 236 (statement of the Association of Reserve City Bankers, an association of the highest-ranking executives from the Nation's major banking institutions, discussing its concerns about inequities between credit unions and other depository institutions). See also *Budget Implications and Current Tax Rules Relating to Troubled Savings and Loan Institutions: Hearings Before the House Comm. on Ways and Means*, 101st Cong., 1st Sess. 308 (1989) (statement of Thomas Rideout alleging that "[m]ajor changes during the 1970's and 1980's have eroded the

The General Accounting Office (GAO) issued its report in 1991. See *Credit Unions: Reforms for Ensuring Future Soundness* (July 1991) (GAO Report). The report highlighted the NCUA's 1982 policy change and stated that "[f]or the first time, credit unions could have members with different common bonds." *Id.* at 219; see also *id.* at 215 (stating that "common bond requirements have been loosened considerably" and that "groups with very different common bonds are permitted to belong to a single credit union"). In its recommendations to Congress, the GAO suggested (*id.* at 231 (emphasis added)):

> If credit unions are to remain distinct from other depository institutions because, in part, of their common bond membership requirement, and if this requirement is intended to further the safe and sound operation of credit unions[,] * * * [then] Congress should consider stating this general intent in legislation and setting forth guidelines on the limits of occupational, associational, and community common bonds, as well as the purpose and *limits of multiple group charters*. These guidelines should be for all federally insured credit unions.

---

uniqueness of credit unions in * * * key areas: * * * erosion of the common bond expanded membership so it can be as broad as anyone over the age of 50"); *Problems of the Federal Savings and Loan Insurance Corporation [FSLIC]: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong., 1st Sess. Pt. IV, at 473, 477 (1989) (propounding written questions to credit union representatives to elicit responses to "[c]oncerns" that "recent regulation[s] issued by the NCUA have made the 'common bond' requirement meaningless").

In 1991 Congress passed the Federal Deposit Insurance Corporation (FDIC) Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236. The Senate Report to that legislation contains several references to the GAO Report. None of the GAO's recommendations concerning the common bond requirement, however, were mentioned in that Senate Report.[19]

Indeed, Congress has amended the FCUA in five different laws enacted since publication of the GAO Report. See note 17, *supra*. In none of them has Congress altered the NCUA's interpretation of the common bond requirement in any way. "[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *United States* v. *Riverside Bayview Homes, Inc.*, 474

---

[19] Among the recommendations of the GAO cited in the Senate Report, which the FDIC Improvement Act ultimately did not include, were that "areas relating to [credit union's] regulation and insurance * * * can be improved," "minimum capital levels be established for credit unions," "credit unions be required to expense their 1 percent deposit over a period of years," "federally-insured credit unions be permitted to invest in corporate credit unions only if they are also federally-insured," "the NCUA establish loans-to-one-borrower limits and minimum capital requirements for corporate credit unions," and "reduce[] the Central Liquidity Fund's borrowing authority." S. Rep. No. 167, 102d Cong., 1st Sess. 200-202 (1991). Additionally, the Senate Report explained that provisions in the FDIC Improvement Act governing credit unions were made "along the lines recommended by the GAO [in *Reforms for Ensuring Future Soundness*]" and that "[t]hese changes will strengthen safety and soundness while continuing to recognize that credit unions are unique among depository institutions." *Id.* at 201.

U.S. 121, 137 (1985). See also *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599-601 (1983).

Accordingly, not only did the court err in conferring standing on respondents, it also erred in holding that the NCUA's interpretation of the statute was impermissible.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
ROBERT M. FENNER
General Counsel
FRANK W. HUNGER
Assistant Attorney General
JOHN K. IANNO
Attorney
National Credit Union Administration
SETH P. WAXMAN
Deputy Solicitor General
DAVID C. FREDERICK
Assistant to the Solicitor General
DOUGLAS N. LETTER
JACOB M. LEWIS
MICHAEL E. ROBINSON
Attorneys

MAY 1997